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TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1280

VAIL MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 212–216) is reported in 158 F. 2d 664. The findings of fact, conclusion of law, and order of the National Labor Relations Board (R. 9–59) are reported in 61 N. L. R. B. 181.

JURISDICTION

The decree of the court below (R. 218–222) was entered on January 25, 1947. The petition for a writ of certiorari was filed on April 16, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended,

and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the Board properly determined that an employer violated Section 8 (1) and (3) of the National Labor Relations Act by discharging two supervisory employees because of their refusal to acquiesce in the employer's scheme of classifying them as non-supervisory employees in order to have them vote against a union in an election to be conducted by the Board among non-supervisory employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 9.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on March 31, 1945, issued its findings of fact, conclusions of law, and order (R. 8–59). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[1]

The Company's employees began to join the United Steelworkers of America, affiliated with the C. I. O., hereinafter called the Union, during the

[1] In the following statement, the references preceding the the semicolon are to the Board's findings, including the findings of the trial examiner adopted by the Board; succeeding references are to the supporting evidence.

summer and fall of 1943 (R. 23–24; 65–72, 86–87). On November 29, 1943, the Union filed with the Board a petition for investigation and certification seeking to establish its status as collective bargaining representative of the Company's non-supervisory employees (R. 24; 125, 184–185). Between November 29, 1943, and December 4, 1943, the Company engaged in an active campaign to coerce its employees to abandon the Union (R. 10, 25–27; 73–75, 90, 97, 100–102, 105–106, 125, 138–139). As part of this campaign the Company discriminatorily discharged 23 employees because of their membership and activity in the Union (R. 12–14, 28–50, 56–57; 66–68, 71–72, 75, 77–78, 82–85, 90, 91–98, 103–104, 185–186, 187–188, 190–192, 194–198).

On December 4, 1943, Walter Vail, president of the Company (R. 23; 184), at the request of the Board, began compiling a list of employees eligible to vote in the election which the Board might conduct in the representation proceeding initiated by the Union's petition (R. 50; Tr. 505–506). In connection with the compilation of this list, President Vail informed Frank Mastik, who had been in charge of the day shift in the standard staple department for nine years (R. 50; 72, 85, 94–95), and his brother, Joseph Mastik, who had been in charge of the night shift in the same department for four years (R. 50; 73), that in making up the list the Company was classifying them

as day and night operators so that they could vote against the Union (R. 50; 76, 205). Both of the Mastiks had the power effectively to recommend the hiring and discharging of employees (R. 11; 72, 73, 85, 125–126, 188–189).

Over the week-end the Mastiks talked over the Company's proposal and concluded that the other employees would resent the participation of their supervisors in the election (R. 51; 76, 189). Accordingly, on the following Monday, December 6, they informed President Vail that they would not agree to being classified as non-supervisory employees for the purpose of voting in the election, and rather than participate in such a course of action, they would leave the Company's employ (R. 51–54; 76, 189). President Vail thereupon acquiesced in their refusal and listed them on the eligibility list as supervisory employees (R. 51–54; 76, 189–190). However, about five minutes later the Mastiks were summoned back to President Vail's office and discharged (R. 51–54; 76–77, 188, 190). President Vail accompanied them from the plant, saying that he wanted "to see that you do not take anything that belongs to the company" (R. 51; 76–77, 190, Tr. 547). Frank Mastik had worked for the Company since 1922 (R. 50; 72); Joseph, since 1935 (R. 50; 73).

The Board concluded that the Company, by attempting to persuade the Mastiks to consent to classification as non-supervisory employees for the

purpose of voting against the Union in the contemplated Board election, interfered with the rights guaranteed its employees by Section 7 of the Act, thereby committing an unfair labor practice within the meaning of Section 8 (1) of the Act (R. 11, 54). The Board also concluded that the Company, by discharging the Mastiks for refusing to assist it in the commission of an unfair labor practice, violated Section 8 (1) and (3) of the Act (R. 11–12, 54). In answering petitioner's contention that the discharges could not be regarded as violative of Section 8 (3) because they would not discourage membership in the Union, the Board pointed out that (R. 11–12):

> It is a reasonable inference that, in a small plant such as the respondent's, where the employees are aware of the respondent's opposition to the Union, the discharge of supervisory employees for refusing to aid the respondent in its campaign against the Union would come to the attention of the ordinary employees, would cause such employees reasonably to fear that the respondent would take similar action against those who favored the Union, as in fact it did, and would therefore discourage membership in the Union.

The Board further found that "whether the discharges be viewed as violations of Section 8 (1) or of Section 8 (3) of the Act," reinstatement of the Mastiks with back pay "is necessary" in order to effectuate the policies of the Act (R. 12).

Accordingly, the Board by its order directed the Company to cease and desist from its unfair labor practices, to reinstate with back pay the employees discriminatorily discharged, including Frank and Joseph Mastik, and to post appropriate notices (R. 15–17).

The Board filed a petition for enforcement of its order in the court below (R. 1–7), and on January 2, 1947, the court handed down its opinion (R. 212–216) and on January 25, 1947, entered its decree (R. 218–220) enforcing in full the Board's order.

ARGUMENT

Petitioner's attack upon the validity of the Board's determination that the discharge of the Mastiks violated the Act rests upon the assumption that the discharge could not be unlawful unless it invaded some right secured to the Mastiks by the Act (Pet. 3, 4, 5, 11, 12, 13). The Board, however, found that the discharge of the Mastiks because they would not participate in the Company's efforts to defeat unionization of the non-supervisory employees invaded rights secured to the non-supervisory employees by the Act and was for that reason violative of the Act (R. 11–12). The Board found that the discharge would cause "ordinary" employees "reasonably to fear" that the Company would take "similar action against those who favored the Union" and would thus discourage the non-supervisory employees

from joining the Union (R. 11–12). The Board also found that the discharges interfered with the freedom of non-supervisory employees to join the Union (R. 12). The court below held that these findings were supported by substantial evidence (R. 215–216).

The Circuit Courts of Appeals for the Fifth and the Eighth Circuits have likewise sustained the Board's determinations that the discharge of supervisory employees because they refused to engage in unfair labor practices invaded rights guaranteed to non-supervisory employees by the Act and therefore constituted violations of Section 8 (1) and (3) of the Act. *National Labor Relations Board* v. *Richter's Bakery,* 140 F. 2d 870, 872–873 (C. C. A. 5), certiorari denied, 322 U. S. 754; *Eagle-Picher & Smelting Co.* v. *National Labor Relations Board,* 119 F. 2d 903, 912–913 (C. C. A. 8); cf. *Matter of Ronrico Corp.,* 53 N. L. R. B. 1137, 1169; *Matter of Reliance Mfg. Co.,* 60 N. L. R. B. 946, 950–952, 963–964. Petitioner is mistaken in asserting that in each case where foremen have been ordered reinstated with back pay, "the order was predicated upon discrimination against the foreman on the ground that they were either members of the union or were attempting to exercise rights guaranteed to them by the National Labor Relations Act" (Pet. 9); on the contrary, in none of the foregoing cases was the foreman a member of the union or at-

tempting to exercise any right guaranteed by the Act, unless the right of a supervisor to maintain a neutral position can be said to be a right guaranteed to supervisors by the Act.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decision nor any question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

GERHARD P. VAN ARKEL,
General Counsel,
MORRIS P. GLUSHIEN,
Associate General Counsel,
RUTH WEYAND,
BEN GRODSKY,
Attorneys.
National Labor Relations Board.

MAY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

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